

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF NEW YORK
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In re: . Brooklyn, New York
MOHAMMED HASSAN, . September 11, 2014
Debtor. . 12-43627
Calendar Time:
3:00 P.M.

8 [34] MOTION TO COMPROMISE CONTROVERSY

9 [48] AMENDED MOTION TO CONVERT CASE TO CHAPTER 13
10 (RE: RELATED DOCUMENT(S) [46] MOTION TO CONVERT
11 CASE TO CHAPTER 13

12 BEFORE HONORABLE CARLA E. CRAIG
13

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1 THE CLERK: Mohammed Hassan.

2 May we have appearances, please?

3 MR. DAHIYA: Good afternoon, Judge. Karamvir Dahiya
4 for Mr. Mohammed Hassan.

5 MR. KRAMER: Samuel Kramer, attorney for Richard
6 O'Connell, Chapter 7 trustee.

7 MR. SOMER: Good afternoon, your Honor. Harold
8 Somer for Yair Kerstein.

9 THE COURT: Okay. All right. Go ahead, Mr. Kramer.

10 MR. KRAMER: We're on today, your Honor, on two
11 things. One is the adjourn date on our -- the trustee's
12 motion pursuant to Rule 9019 to approve a settlement with Mr.
13 Kerstein pursuant to which the trustee will be paid --
14 actually the trustee has been paid, it's in his account now,
15 \$45,000 in resolution of all claims, and on the debtor's
16 motion to convert the case to Chapter 13.

17 The last time we were here the debtor indicated that
18 he had additional evidence. Your Honor issued an order.

19 THE COURT: And this would be the point that on
20 which evidence was to be submitted was on the question of
21 whether the debtor is an individual with regular income --

22 MR. KRAMER: Yes.

23 THE COURT: -- that would qualify -- is eligible to
24 be a Chapter -- a debtor under Chapter 13, and the language in

1 particular under Section 109 is that --

2 MR. KRAMER: I could --

3 THE COURT: -- a person -- an individual with
4 regular income. Okay. One second. Okay. Excuse me. So
5 regular income is defined in Section 10130 --

6 MR. KRAMER: I have it here, your Honor.

7 THE COURT: -- as being -- well, let me just read it
8 into the record so that we're all on the same page. The term,
9 individual with regular income is defined in Section 10130 of
10 the Bankruptcy Code as being, "An individual whose income is
11 sufficiently stable and regular to enable such individual to
12 make payments under a plan under Chapter 13 of this Title."

13 Okay. So was the -- that is the point that counsel
14 was given an opportunity to submit evidence on.

15 MR. KRAMER: And it is the debtor's burden to meet
16 that under the In re: Antoine 208 BR 17. Your Honor issued
17 an order after the last hearing, which was quite specific
18 about the need to submit those documents by August 22nd, 2014
19 together with indications of the witnesses who would support
20 that, those claims of regular income.

21 The only that the debtor submitted was on August
22 14th, docket number 58, which appears to be -- there's no
23 affidavit, there's no explanation, it's just 21 pages, nine of
24 which appear to be repetitive, and these appear to be

1 checkstubs which the last one of which is over a year, or
2 approximately one year ago. They total \$88,949, and as I say,
3 they are dated from January 12th, 2012 through October 21st,
4 2013.

5 There is no affidavit. There is no explanation.
6 There is no anything in compliance with your Honor's order
7 with respect to substantiating the validity of this submission
8 as proof of regular income. The debtor did make another
9 submission which appears on docket number 59, but immediately
10 after that was submitted on again August 14th, the very next
11 day your Honor issued an order that restricted access to the
12 document. I have never seen it, and your order said the filer
13 is directed to refile the document together with all
14 attachments originally filed, redacted as required pursuant --
15 by Bankruptcy Rule 9037 on or before August 20th, 2014.
16 That's docket 60 is your Honor's order. Again, there was no
17 compliance with that order.

18 So we have two very specific orders which required
19 very specific things, none of which were performed. The
20 debtor has failed to failed its burden under the case I just
21 cited and under Rule 10130, Section 10130 and under In Re:
22 Antoine. Your Honor has indicated previously that this is the
23 only issue which is relevant at this point, and we would
24 respectfully submit that there is no reason to grant the

1 motion to convert and every reason to grant the 9019
2 application.

3 Thank you, your Honor.

4 MR. DAHIYA: Your Honor asked me to submit evidence
5 that this is a man with regular income. I've submitted
6 invoices.

7 THE COURT: Well, what I directed you to do was to
8 submit evidence, and I also directed that any document must be
9 accompanied with -- supported by an affidavit that establishes
10 the document's admissibility and explains how the document
11 shows that the debtor is an individual with regular income,
12 and that all supporting affidavits were to be filed by August
13 22, and no supporting affidavit was filed.

14 MR. DAHIYA: I did file the one-year bank statement,
15 your Honor, where he makes 40,000, \$42,000.

16 THE COURT: But you didn't find any -- first of all
17 --

18 MR. DAHIYA: Yes, your Honor.

19 THE COURT: -- you didn't -- the bank statements
20 that you filed --

21 MR. DAHIYA: Yes, your Honor.

22 THE COURT: -- don't show \$40,000.

23 MR. DAHIYA: They --

24 THE COURT: You filed something today.

1 MR. DAHIYA: No, no. That was just to show ongoing
2 income. Previously I filed 35,000, more than 30,000, 35,000.

3 THE COURT: Even if I were to look at --

4 MR. DAHIYA: Yes.

5 THE COURT: -- those bank statements, they don't
6 show net income, positive net income over that period of time
7 of more than approximately \$5,000.

8 MR. DAHIYA: But that's the -- respectfully, you're
9 right, your Honor. There is --

10 THE COURT: So you have to have net --

11 MR. DAHIYA: No, but --

12 THE COURT: The documents, in order to be eligible,
13 the debtor must have income that is available to make plan
14 payments sufficient --

15 MR. DAHIYA: That is true, your Honor.

16 THE COURT: And this doesn't show that.

17 MR. DAHIYA: The -- your Honor, I think we are
18 respectfully conflating two things.

19 THE COURT: Sufficiently stable and regular to
20 enable such individual to make payments under a plan. What
21 you submitted were bank statements from a -- that are business
22 bank statements --

23 MR. DAHIYA: Yes, your Honor. That is true.

24 THE COURT: -- because the debtor operates as a DBA.

1 MR. DAHIYA: Yes.

2 THE COURT: And they show -- they don't show --

3 MR. DAHIYA: Positive?

4 THE COURT: They don't show positive net income, and
5 they don't show regular payments to the debtor either.

6 MR. DAHIYA: That is true because he's -- he is in a
7 business, your Honor. The income is -- he does make income of
8 30, 40 -- between 30 and 40,000. It goes up and down. He's
9 in business. Now --

10 THE COURT: But his gross income -- the gross income
11 of his business --

12 MR. DAHIYA: Yes, your Honor.

13 THE COURT: -- is not what we're talking about.
14 We're talking about his individual income, which of course
15 would be net after the payment of his business expenses, and
16 it has to be sufficiently stable and regular to enable the
17 individual to make plan payments, which I don't believe this
18 shows. It shows at most -- it shows net income --

19 MR. DAHIYA: Of 4 or 5,000. That's what --

20 THE COURT: -- of, for that six-month period of
21 \$1,281.79. So that's the net income that is shown, and as far
22 as -- there's no indication either in the bank statements that
23 I could ascertain nor in any affidavits since there wasn't an
24 affidavit, of whether any of the deductions were -- went to

1 him, would be -- were his income. So --

2 MR. DAHIYA: There's an affidavit of I think it was
3 -- the affidavit was filed prior to when we filed the
4 objection, when we filed the objection to the settlement.

5 THE COURT: Yes, but the affidavit doesn't
6 authenticate these documents or explain how they show his
7 income, which is what you were directed to do. You were
8 directed to file an affidavit accompanying the documents that
9 explained how they -- authenticated them and explained how
10 they went to show that the debtor is an individual with
11 regular income as required under Section 109 --

12 MR. DAHIYA: That is true.

13 THE COURT: -- and Section 10130, and that was not
14 done, and even if I were to look at those documents, which I
15 am not going to do, they are not properly considered on this
16 motion, but if I did they do not show that he's an individual
17 with regular income.

18 MR. DAHIYA: Your Honor --

19 THE COURT: They show net, as I said, net income of
20 about -- of slightly over \$1,000 for the six-month period, and
21 that does not establish that he is an individual with regular
22 income.

23 MR. DAHIYA: Respectfully, there's a little
24 distinction I wish to draw, your Honor, there is a difference

1 between the feasibility and eligibility --

2 THE COURT: That's correct, but eligibility, and I'm
3 not conflating the two. I'm very cognizant of that
4 distinction.

5 MR. DAHIYA: Yes.

6 THE COURT: What I'm looking at is whether he is an
7 individual -- whether you have carried the burden of proof to
8 show that he is an individual with regular income, and the
9 Code specifically defines that in Section 10130 as meaning,
10 "An individual whose income is sufficiently stable and regular
11 to enable such individual to make payments under a plan under
12 Chapter 13 of this Title," and you have not -- number one, you
13 didn't comply with my order.

14 By the terms of the order these documents are not to
15 be considered because you didn't accompany them with an
16 affidavit, nothing authenticating them, nothing explaining
17 them, explaining how they go to establish it. Number two,
18 they don't show that he has income that is sufficiently stable
19 and regular to enable him to make payments under a plan under
20 Chapter 13 of this Title.

21 So I think I am constrained to deny this application
22 to convert the case to Chapter 13.

23 MR. DAHIYA: Your Honor, I -- if the debtor -- if
24 the debtor does not come forward with the plan payments it's

1 fine. The case can be converted to Chapter 7 trustee.

2 THE COURT: I understand that, but in the first
3 instance conversion is not appropriate unless the debtor is
4 eligible to be a debtor in Chapter 13, and --

5 MR. DAHIYA: That is true.

6 THE COURT: -- I -- and it's not -- it is -- there
7 is an objection here by two parties in interest to the
8 conversion of the case under Chapter 13 -- to Chapter 13, and
9 it is incumbent upon the debtor to establish that he's
10 eligible, and he hasn't done that.

11 MR. DAHIYA: There is -- it's not all this -- the
12 way he operates is like it is not an independent business.

13 THE COURT: Okay. See, I'm -- what you're telling
14 me here is not -- means nothing to me because you were
15 directed --

16 MR. DAHIYA: Yes.

17 THE COURT: -- to put any type of explanation that
18 you wanted to make of this -- of the documents that you were
19 submitting. You were directed to put that -- that that would
20 be submitted by way of affidavit.

21 MR. DAHIYA: I was supposed to by --

22 THE COURT: You didn't do that. You didn't do that.

23 MR. DAHIYA: What happened was I wanted to prepare -
24 -

1 THE COURT: I don't care what happened.

2 MR. DAHIYA: It's important.

3 THE COURT: I was very clear in this order, and I am
4 -- and this was your second chance to submit this. We had
5 this -- this is our third hearing on this, and I was clear in
6 my order for a very good reason, because I want it to be -- I
7 wanted the rules, the ground rules that we were operating
8 under to be crystal clear, and you -- they were, and you did
9 not comply.

10 MR. DAHIYA: I -- that's exactly what I was saying,
11 your Honor, and I wanted to meet my client on 13th or 14, I
12 wanted to sit down, prepare. On 14th, on 15th I have to catch
13 a flight. I was out of the country.

14 THE COURT: Well, that's really unfortunate that
15 your --

16 MR. DAHIYA: I came back on the 1st.

17 THE COURT: Your travel schedule unfortunately is
18 not something that is to my mind an excuse for this.

19 MR. DAHIYA: I can bring -- my client can testify if
20 you allow him, but --

21 THE COURT: It's -- I -- no, I won't.

22 MR. DAHIYA: About the income.

23 THE COURT: No. I won't allow him to because, as I
24 said in my order, that any witness whose affidavit was not

1 submitted would not be permitted to testify.

2 MR. DAHIYA: I only have an affidavit wherein he
3 says that he makes \$35,000 and he makes enough money, your
4 Honor. That's --

5 THE COURT: Yes, except that affidavit doesn't -- it
6 doesn't pertain to these bank statements, and it doesn't
7 substantiate -- it's not substantiated by the bank statements,
8 which don't show net earnings of that amount insofar as I can
9 tell by looking at them.

10 MR. DAHIYA: That is true. I see the bank
11 statement. That does not -- it's -- the bank statement -- I
12 looked at the bank statement.

13 THE COURT: And he didn't provide an explanation
14 that would lead me or enable me to conclude otherwise.

15 MR. DAHIYA: All I can --

16 THE COURT: And the reason that I entered this
17 order --

18 MR. DAHIYA: Yes.

19 THE COURT: -- was just to prevent just such a thing
20 from happening as you're trying to do today, which is filing a
21 document on the day of the hearing --

22 MR. DAHIYA: No, that is --

23 THE COURT: -- which doesn't give -- which does not
24 give your adversaries --

1 MR. DAHIYA: That is true.

2 THE COURT: -- a fair opportunity to review or to
3 respond.

4 MR. DAHIYA: That is true.

5 THE COURT: And that is why I set a schedule
6 allowing ample time --

7 MR. DAHIYA: Yes.

8 THE COURT: -- for you to provide this information
9 and providing them with an opportunity to respond.

10 MR. DAHIYA: That is true.

11 THE COURT: So respectfully, I am not going to
12 consider the -- whatever it is you want to proffer at this
13 point.

14 MR. DAHIYA: But your Honor, even if you go by like
15 his net income of \$1,000, let's say even if we go by this --

16 THE COURT: \$1,000 over the period of -- over a
17 period of six months?

18 MR. DAHIYA: No. I mean every month he --

19 THE COURT: No. That's not what the bank statements
20 show. They show if you net out the --

21 MR. DAHIYA: That is true.

22 THE COURT: It's a net plus of \$1,200 over a period
23 of six months because there are months --

24 MR. DAHIYA: Yes. That is true.

1 THE COURT: -- in which he, according to these bank
2 statements, in which he has a negative balance in his account.

3 So --

4 MR. DAHIYA: Your Honor, is it --

5 THE COURT: So you were saying -- you were going to
6 say even if you look at \$1,000 a month?

7 MR. DAHIYA: I mean the issue is if he has got
8 regular income, he has regular income, but there's no net
9 income, you're right. I agree with you.

10 THE COURT: No, there isn't. It seems to me there's
11 no regular income if his income is negative in one month,
12 positive in the next month, negative in the next month,
13 positive in the next month, negative, negative, with a total
14 positive over a period of six months of \$1,200, which is
15 clearly insufficient to make plan payments, and it's not
16 regular. It isn't -- it doesn't -- it's in varying amounts,
17 negatives and positives over this whole period of time. So
18 it's not -- this tends not to show -- to the extent this shows
19 anything, it shows that he is not an individual with regular
20 income.

21 MR. DAHIYA: I mean the documents are what they are,
22 your Honor. We cannot twist or emasculate. We cannot like
23 play around with that to create or mis-create anything. This
24 is the bank statement. He does make income -- some incomes.

1 I mean not all income is put in the bank, but --

2 THE COURT: Okay. I am not -- then that was
3 something, if there was additional proof of income you were
4 going to submit, you should have submitted it.

5 MR. DAHIYA: There is no additional proof other than
6 his words, that's all.

7 THE COURT: Well, you didn't provide an affidavit
8 with that either, so I'm not going to permit him to testify
9 about that at this point because I was very clear about this.

10 MR. DAHIYA: That is -- your Honor, I leave it up to
11 you if -- I mean the documents we rely on, these are the
12 documents, the bank statements given. It's up and down. It's
13 not -- I mean he's a businessman, typical businessman. He
14 goes to the market, gets a contract, gets it done. If you
15 look into the statements, your Honor, these are the statements
16 that are given and it takes six months to get the money back
17 from the state and other parties.

18 MR. SOMER: Your Honor, I have to object to what
19 counsel is saying.

20 THE COURT: Yes.

21 MR. SOMER: He's testifying for the debtor.

22 THE COURT: None of this is something -- is anything
23 that can be given any weight here because this is not -- what
24 your representations on the record are not in any way, shape,

1 or form evidence, nor are they substantiated by anything that
2 is in the record, and it was just to avoid the problem of
3 dealing with counsel's unsubstantiated representations that I
4 directed that the evidence be submitted in advance with an
5 affidavit from the witness, the -- a competent witness.

6 MR. DAHIYA: That is true. The only evidence, the
7 hard concrete evidence is the bank statement, and only his
8 words can testify, that's all. I mean --

9 THE COURT: Okay. All right. I'm respectfully
10 denying the motion to convert.

11 MR. DAHIYA: Your Honor, is it possible, now coming
12 back to the, as far as the motion for settlement is concerned,
13 our request is that we can -- if our claims can be abandoned
14 we wish to pursue other claims respectfully because why am I
15 saying this? Because Mr. Kerstein, the lender, has liens on
16 his house and personal residence and all, they're serious
17 claims, and I don't think we should let those claims be
18 compromised.

19 THE COURT: Well, but how -- I think in reviewing a
20 settlement what I have to evaluate is benefit to creditors.
21 The interests of the debtor are really not to be considered
22 here. It's benefit to the creditors, and it's hard for me to
23 see how there's a benefit to creditors in this.

24 MR. DAHIYA: I mean these are the claims if you look

1 into -- I did mention in my objection to the settlement that
2 the 341, there are various issues of whether I was -- the
3 debtor was given a chance, that there --

4 THE COURT: Given what chance?

5 MR. DAHIYA: I mean once a trustee discover assets
6 he is supposed to tell the debtor.

7 THE COURT: Where does that -- okay. Where do you -
8 - what do you come up with? Where does this exist in your
9 view?

10 MR. DAHIYA: That exists in 341, Section 342(d).

11 THE COURT: Okay. Section 342(d), let's just look
12 at that for a minute because you've said this before, and I
13 honestly don't know what you're talking about. Section 342(d)
14 says that, "In a case under Chapter 7 of this Title in which
15 the debtor is an individual and in which the presumption of
16 abuse arises under Section 707(b), the clerk shall give
17 written notice to all creditors not later than ten days after
18 the date of the filing that the petition -- of the petition
19 that the presumption of abuse has arisen. So I don't know
20 where -- what that has to do with what you're saying.

21 MR. DAHIYA: No, the -- I think the section is
22 341(5), the conclusion of the [] prior to the conclusion of the
23 proceedings. That's Section 341. Sorry. Section 341(b).

24 THE COURT: Well, I don't have -- I don't think that

1 -- okay. Mr. Kramer, do you have some response that you want
2 to give to this?

3 MR. KRAMER: I submitted on docket number 51. I
4 addressed that issue, and for one, I apologize for
5 familiarizing myself with what I wrote previously, but your
6 Honor, the debtor had his 341 meeting before the prior
7 trustee, Trustee Krohn. The objection is posited on the idea
8 that somehow the trustee was supposed to take the debtor
9 through his options under Chapter 7 and 13, but Mr. O'Connell
10 was the successor trustee to Mr. Krohn. Mr. Krohn took his
11 341 meeting, and to the extent that there was any issue
12 regarding the claims that are being raised in opposition to
13 the 9019, they were addressed by Mr. Krohn previously, and he
14 was represented by counsel. We should also add that.

15 THE COURT: So the debtor was represented by counsel
16 in this?

17 MR. KRAMER: Yes.

18 MR. DAHIYA: That does not make a difference if you

19 --

20 MR. KRAMER: It makes all the difference in the
21 world.

22 THE COURT: But I don't think that this has anything
23 to do with whether the settlement should be approved or not.

24 MR. DAHIYA: I mean the settlement, I mean --

1 THE COURT: The settlement is a different -- it's a
2 wholly different question.

3 MR. DAHIYA: The entire thing, if you look into it,
4 I mean the way it is an unperfected lien, the way the trustee
5 is hypothetically in credit, but that has not been exercised.
6 For \$45,000 it amazes how everything is given up. Basically
7 the private lender walks away free.

8 THE COURT: All right. Do you -- would you like --
9 do you want to -- let's see. Just one second.

10 MR. DAHIYA: At least our claims to be abandoned to
11 us, that's all we are looking for, Judge.

12 THE COURT: But does the settlement involve a
13 compromise of these claims? It does, does it not? I'm asking
14 Mr. Kramer.

15 MR. KRAMER: Yes. Everything.

16 THE COURT: Because that's what is being -- what
17 \$45,000 is being paid for, correct?

18 MR. KRAMER: \$45,000 is being paid because we
19 thought we had an objection to the mortgage, and we negotiated
20 a settlement based on that objection, and in order to achieve
21 a payment the terms of the settlement had to be -- had to give
22 what they gave, otherwise I wouldn't be getting the \$45,000.

23 THE COURT: Okay. So explain to me why you think
24 \$45,000 is an appropriate amount.

1 MR. KRAMER: If I do that I'm going to be disclosing
2 the weaknesses of my case regarding the mortgage which I would
3 be attacking.

4 THE COURT: Well, I'm afraid you're going to have to
5 at least provide some kind of explanation.

6 MR. KRAMER: I've done that in my papers. I mean
7 I've talked about it in the most general terms. You know,
8 when -- I've brought 9019 motions many times before, and it's
9 -- you know, it's a line, the razor's edge that the trustee
10 has to walk between explaining that for \$45,000 I'm getting
11 above the -- I think the standard is above lowest standard of
12 reasonableness. I forget the precise words, but there are --
13 when I -- we thought when we got the case that there were
14 issues with the mortgage which we would be able to prevail in
15 state court.

16 On further analysis we determined that our case is
17 not as strong as we thought it was, that the documents indeed
18 would be susceptible to many of the arguments that were being
19 raised. \$45,000, I will say that \$45,000, based on what I
20 know about these documents, is a very good deal.

21 THE COURT: All right. So Mr. Dahiya, the factors
22 that are to be considered in evaluating a settlement do not
23 include the interests of the debtor, whether the debtor would
24 prefer to continue the litigation. It's the interests of

1 creditors, and --

2 MR. DAHIYA: Even if the --

3 THE COURT: And I don't see anyone here objecting
4 based upon the interests of creditors.

5 MR. DAHIYA: I mean even if your Honor, he happens
6 to be -- even if the trustee is a fiduciary, I don't
7 understand how even if the trustee is a fiduciary for the
8 debtor. Second, this loan itself --

9 THE COURT: He's a fiduciary to creditors.

10 MR. DAHIYA: To a solvent debtor. I mean this loan
11 --

12 THE COURT: He's not a solvent debtor. This is a no
13 asset --

14 MR. DAHIYA: Of course he's solvent, your Honor.

15 THE COURT: This is a no-asset case. He's clearly
16 an insolvent debtor. There's no -- there's not going to be a
17 return to the debtor here. I don't know what universe he's a
18 solvent debtor.

19 MR. DAHIYA: What they're looking into is, if you
20 look into the settlement, they're saying that we looked into
21 the mortgage papers and the mortgage papers, there are real
22 issues, your Honor. What has happened in the mortgage papers
23 is I mentioned that in my papers is they say that they have a
24 proper mortgage registration. They filed the mortgage, they

1 filed applications to avoid mortgage taxes, wherein they
2 stated it's a home, it's a residence.

3 The mortgage filing itself is not a proper one. The
4 trustee talks only about that thing, but the trustee has not
5 examined other claims of usury, other claims --

6 MR. KRAMER: Your Honor, the last time we were here
7 your Honor made it very clear that you did not want to hear
8 about usury or Tyler. I just want to be clear about that.

9 THE COURT: Okay, okay.

10 MR. DAHIYA: So let me finish.

11 THE COURT: Just one minute, please.

12 MR. DAHIYA: Just we are losing everything. At
13 least leave our claim to us, that's all.

14 THE COURT: I don't think so because that's the
15 whole point. They're not your claims. They're the trustee's
16 claims.

17 MR. DAHIYA: But that's the other interesting part.

18 THE COURT: They're the trustee's claims.

19 MR. DAHIYA: Can I please address one big issue that
20 has happened here is the way the Supreme Court is heading
21 towards --

22 THE COURT: Just one second. Just one second.

23 MR. DAHIYA: Yes.

24 THE COURT: Okay. All right. At this point I am

1 really not interested in considering any arguments that you
2 haven't previously made in your papers because I think you --
3 I don't believe it's fair for you to be coming up with new
4 ideas now, and --

5 MR. DAHIYA: No, no, no, no.

6 THE COURT: -- I believe that you've had ample
7 opportunity.

8 MR. DAHIYA: No. I'm not coming up with new -- I
9 have to say something very important, your Honor, because this
10 will have an impact on us. All what I'm saying --

11 THE COURT: It has an impact on you, but it's not an
12 impact that is entitled to be considered.

13 MR. DAHIYA: Of course these are my claims, and I'll
14 tell you how these are my claims.

15 THE COURT: They belong to the estate.

16 MR. DAHIYA: No, no, but that's exactly what I want
17 to tell you, and that issue, the issue of standing can be
18 raised even on an appeal.

19 THE COURT: Oh, I'm --

20 MR. DAHIYA: There is something I want to say.
21 Please hear me just one minute. Not more than this. It is
22 widely believed that these claims are claims of the estate.
23 They -- but now the way that -- it is going to sound very
24 grandiose, but the established precedents by the Supreme Court

1 and at least in case laws is clear. Party has to have an
2 injury to have a claim. The injured party is this one, the
3 debtor. The estate has become a separate issue. The trustee
4 --

5 THE COURT: I didn't say your client didn't have
6 standing. I said that under 9019 your client's interests are
7 not something that is weighed in determining whether the
8 settlement should be approved. I didn't say he doesn't have
9 standing.

10 MR. DAHIYA: I mean respectfully, Judge, isn't the
11 trustee supposed to examine, look into the claims, for
12 example, he raised, and the trustee was aware of this that
13 these are the -- we are just talking about whether the lien is
14 proper or not, but they have not given a single sentence as to
15 what it is because in the state court the counsel for Mr.
16 Langer -- no, for Mr. Kerstein filed a statement that these
17 claims are usury claims, HUPA (ph.) claims. We cannot raise
18 them. They belong to the estate. The trustee has not taken
19 care of that. He's not examined that.

20 THE COURT: HUPA claims are not claims that can be
21 asserted against an individual in any event.

22 MR. DAHIYA: I'm sorry. What? The trustee is
23 supposed to examine these claims. I mean the trustee says,
24 "Well, walk away." They are making the walk away for 45,000.

1 They're giving up -- they have a claim of more than 3,
2 400,000. If this claim is denied, the creditors get hundred
3 cent on a dollar, your Honor. They're not getting hundred
4 cents on a dollar here.

5 The best interests of the creditors can be served by
6 foreclosing claim of the lender, which this trustee is not
7 doing.

8 THE COURT: Well, I think you would have to -- given
9 the showing that the trustee's made that this is an arm's-
10 length transaction, it's supported by the creditors, it is --
11 it follows a period of litigation that was fairly extensive,
12 right? It's been about how long? What was the period of time
13 that this --

14 MR. KRAMER: In the state court?

15 THE COURT: This litigation, the investigation that
16 you went on.

17 MR. KRAMER: Oh, from the moment that Mr. O'Connell
18 was appointed in filing number five by the debtor.

19 THE COURT: So --

20 MR. KRAMER: We didn't just trip over this, your
21 Honor.

22 THE COURT: I was going to -- okay. All right.
23 Let's do it this way. What I'm saying is that I think that
24 the trustee's made a showing that this is an appropriate

1 settlement. Certainly he's made a prima facie showing, and at
2 this point I think the burden is on you to come forward with
3 some more -- some other showing than unsubstantiated, vague
4 allegations, which is all that really has been done.

5 MR. DAHIYA: There's no -- if you look into my
6 objections and my notice of motion to convert, the exhibits I
7 filed in the state court, the same exhibits have been attached
8 here. These claims, the lender has no claim. The lender
9 really -- I mean there are claims against the lender by the
10 debtor that not should be thrown away like this.

11 THE COURT: Okay. I have looked at your affidavit,
12 the papers you filed in opposition to the motion to convert,
13 and they are devoid of any specifics about the nature of the
14 claims that you believe that you have. Okay. The papers that
15 you filed --

16 MR. DAHIYA: I mean --

17 THE COURT: Just one -- don't interrupt me, please.
18 The paper that you filed, I assume you're referring to the
19 document you filed on August 7th on the day of the hearing,
20 the last hearing which consisted of copies of the law and a --
21 of a statute, copy of a statute --

22 MR. DAHIYA: No. Not that.

23 THE COURT: -- and which is New York Tax Law Section
24 253-1(a), and the copy of the note and the mortgage, and that

1 -- without any explanation, and that in and of itself provides
2 no basis on which for me to conclude that this is not an
3 appropriate settlement. You can't just throw documents onto
4 the docket say, "See, read those. They show that this is an
5 inappropriate settlement." So as far as I'm concerned, you
6 have not established -- you've not come forward with anything
7 that would call into question the appropriateness of this
8 settlement.

9 MR. DAHIYA: Your Honor, if you look into my Exhibit
10 B of the motion to convert, I have explained -- that document
11 explained in detail why this -- why the lender does not have a
12 proper claim against the estate. I mentioned that, and I mean
13 this is not a case wherein issues were argued in the state
14 court. I mean this is a default just --

15 THE COURT: Was there a -- is there a judgment of
16 foreclosure in this case?

17 MR. DAHIYA: Yes.

18 THE COURT: There was a judgment of foreclosure. Is
19 that correct?

20 MR. DAHIYA: Yes.

21 MR. SOMER: Yes, your Honor.

22 THE COURT: A judgment of foreclosure was entered in
23 favor of Mr. Kerstein. Is that right?

24 MR. SOMER: Correct, your Honor.

1 THE COURT: Okay. And so these are -- these claims
2 are claims against Mr. Kerstein. Is that correct?

3 MR. DAHIYA: Yes, your Honor.

4 THE COURT: Okay. So these are claims that are
5 foreclosed by the judgment of foreclosure because they are
6 claims that --

7 MR. DAHIYA: That's not the issue.

8 THE COURT: Yes, it is.

9 MR. DAHIYA: No, no, no. I mean I --

10 THE COURT: If they're foreclosed by the judgment of
11 foreclosure then principles of res judicata would prevent them
12 from being raised --

13 MR. DAHIYA: We --

14 THE COURT: -- by either you -- by either your
15 client or by a successor interest.

16 MR. DAHIYA: I know we have talked about in the
17 other case too, your Honor. We believe that we stated that In
18 New York State I mean it's a permissive counterclaim.

19 THE COURT: Okay. So your whole objection here is
20 premised on the notion that these claims which could have been
21 raised in the context of the foreclosure action as defenses,
22 but were not, are not precluded by principles of res judicata
23 or by the Rooker-Feldman doctrine because in your view the
24 fact that New York has permissive counterclaims means that

1 they were not required to be raised, and therefore, they're
2 not precluded by res judicata? Is that a fair summary of your
3 argument?

4 MR. DAHIYA: That's one part, and the second main
5 part is if now I can't even go back to the state court because
6 the trustee settles -- when the trustee settles his claim with
7 Mr. Kerstein, I can't even go back because the trustee says,
8 "I settled those claims."

9 THE COURT: Well, right, but that's what his -- he's
10 got the right to do that. He has the absolute -- these are
11 claims that belong to the estate, and besides, these are
12 claims that the principles of res judicata, which apply in
13 state court, also foreclose.

14 MR. DAHIYA: I'm not concerned about anything
15 flowing from the state court, your Honor. I'm more concerned
16 about what will happen here that precludes me. You see --

17 THE COURT: I don't -- I know what you're not
18 concerned about.

19 MR. DAHIYA: He's going to get a house. He's --

20 THE COURT: Okay. Mr. Dahiya.

21 MR. DAHIYA: Yes.

22 THE COURT: Let's keep focused on the main issue
23 here. Your argument is, if I'm understanding this correctly,
24 that the trustee didn't sufficiently consider the option of

1 pursuing these claims against the lender.

2 MR. DAHIYA: Yes.

3 THE COURT: Claims under, I think you said under the
4 banking law, usury claims --

5 MR. DAHIYA: Yes.

6 THE COURT: -- and claims under various consumer
7 protection laws, and that those claims, if the trustee had
8 pursued them, might potentially have yielded a greater
9 recovery to the estate than the amount that the trustee is
10 settling for. Is that correct?

11 MR. DAHIYA: Yes.

12 THE COURT: Is that your argument?

13 MR. DAHIYA: Yes. The trustee --

14 THE COURT: Okay. But so this is all premised on
15 the notion that these claims are still available to be
16 asserted, notwithstanding principles of res judicata, which
17 would attach when -- by reason of the entry of the foreclosure
18 judgment.

19 MR. DAHIYA: Yes, your Honor. If we believe the
20 trustee is the one who has right to prosecute these claims,
21 then the trustee should have done it.

22 THE COURT: Okay. But the trustee -- but aren't
23 these claims that are precluded by the doctrine of res
24 judicata?

1 MR. DAHIYA: No, they are not, your Honor.

2 THE COURT: Okay. And your belief is that they are
3 not precluded because of the New York -- the fact that under
4 New York State law counterclaims are permissive. Is that
5 correct?

6 MR. DAHIYA: Yes. That's true.

7 THE COURT: Okay. Is that -- that's your argument?
8 That's the sum and substance of it?

9 MR. DAHIYA: Yes.

10 THE COURT: Okay. All right. "Under New York law a
11 final judgment on the merits precludes the parties or their
12 privies from relitigating claims that were or could have been
13 raised in that action." That is a quote from Marvel
14 Characters, Inc. versus Simon, 310 Fed Third 280, 286 to 287,
15 Second Circuit, 2002.

16 "In New York res judicata also applies to defenses
17 that could have been litigated, including defenses to a
18 foreclosure." Yeiser versus GMAC Mortgage Corp., 535 F Sup
19 Second 413, 421, Southern District of New York, 2008.

20 Mr. Dahiya contends that New York's permissive
21 counterclaim rule trumps the doctrine of res judicata because
22 claims such as those that he contends should be pursued by the
23 trustee were not required to be raised, nor were they actually
24 litigated in the foreclosure action. Quote, "While New York

1 does not have a compulsory counterclaim rule, a party is not
2 free to remain silent in an action in which he is the
3 defendant, and then bring a second action seeking relief
4 inconsistent with the judgment in the first action by
5 asserting what is simply a new legal theory." Henry Modell &
6 Co., Inc. versus Minister Elders and Deacons of Reformed
7 Protestant Dutch Church, 68 New York Second 456, 461, 1986.

8 "New York's doctrine of res judicata requires a
9 court to analyze whether the second action impairs the rights
10 or interests established in the prior action." See e.g., the
11 case just cited as 461, 462, Classic Automobiles, Inc. versus
12 Oxford Resources Corp., 204 AD Second 209, at 209, First
13 Department, 1994.

14 In this case any attempt to collaterally attack the
15 notes and the mortgages underlying the foreclosure judgment
16 based upon federal consumer laws or usury law is -- runs afoul
17 of New York's doctrine of res judicata --

18 MR. DAHIYA: Here is the --

19 THE COURT: -- and for that reason I respectfully
20 overrule your objection to the settlement, and I think that
21 this hearing is concluded.

22 MR. KRAMER: Thank you, your Honor.

23 MR. SOMER: Thank you, your Honor.

24 THE COURT: You may submit an order.

1 MR. KRAMER: Thank you, your Honor. Should I do one
2 order dealing with both motions or separate orders?

3 THE COURT: Yes.

4 MR. DAHIYA: The concern that I have is he's got a
5 house and Mr. -- there is a lien of the lender on the house.

6 THE COURT: Okay. This is -- this hearing is over,
7 Mr. Dahiya.

8 MR. DAHIYA: Okay. Thank you, Judge.

9

10 * * *

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12 **CERTIFICATION**

13

14 I, Catherine Aldrich, certify that the foregoing is a correct
15 transcript from the electronic sound recordings of the
16 proceedings in the above-entitled matter.

17



18

September 30, 2014

19

Catherine Aldrich